

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA,) 3:12-cv-02265-SI

5 Plaintiff,)

6 v.)

) March 24, 2014

7 THE CITY OF PORTLAND,)

8 Defendant.)

9) Portland, Oregon

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14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE MICHAEL H. SIMON

16 UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES

FOR THE PLAINTIFF:

Billy Williams
Adrian Brown
United States Attorney's Office
1000 SW Third Avenue, Suite 600
Portland, OR 97204

Michelle Jones
R. Jonas Alexander Geissler
U.S. Department of Justice Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

David W. Knight
U.S. Department of Justice
Disability Rights Section
950 Pennsylvania Avenue, NW - NYA
Washington, DC 20530

FOR THE DEFENDANT CITY OF PORTLAND:

Ellen C. Osoinach
David L. Woboril
City of Portland
Office of the City Attorney
1221 SW 4th Avenue, Suite 430
Portland, OR 97204

FOR THE DEFENDANT PORTLAND POLICE ASSOCIATION:

Anil Karia
Tedesco Law Group
3021 NE Broadway
Portland, OR 97232

APPEARANCES (Continued)

FOR ENHANCED AMICUS CURIAE:

Shauna M. Curphey
Curphey & Badger, P.A.
520 SW Sixth Avenue, Suite 1040
Portland, OR 97204

Jessica Ashlee Albies
Creighton & Rose, PC
815 SW Second Avenue, Suite 500
Portland, OR 97204

COURT REPORTER: Dennis W. Apodaca, RDR, RMR, FCRR, CRR
United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503) 326-8182

1 (March 24, 2014)

2 P R O C E E D I N G S

3 (Open court:)

4 THE CLERK: This is the time set for hearing in
5 Civil Case 12-2265-SI, U.S.A. versus City of Portland.

6 Counsel, beginning with plaintiff, would you
7 please identify yourselves for the record.

8 MS. JONES: Michelle Jones for the
9 United States, along with my colleagues John Geissler,
10 Adrian Brown. Behind me, we have David Knight and Billy
11 Williams.

12 THE COURT: Welcome.

13 MS. ALBIES: J. Ashlee Albies for Intervenor AMA
14 Coalition for Justice and Police Reform, along with
15 Shauna Curphey.

16 MR. KARIA: Anil Karia for the Portland Police
17 Association.

18 THE COURT: Good morning. Welcome.

19 MS. OSOINACH: Ellen Osoinach for the City.

20 MR. WOBORIL: David Woboril, City of Portland.

21 THE COURT: Welcome. Before hearing further
22 argument from the four parties, I think it might be useful
23 for you to hear how I'm tentatively viewing the matter
24 before me. So my plan is to briefly identify my tentative
25 thoughts, and then perhaps take a short break, and then

1 give the parties an opportunity to respond.

2 Is that procedure acceptable to the parties?

3 MR. GEISSLER: It is, Your Honor. Thank you.

4 MR. WOBORIL: For the City, that's fine, Judge.

5 MS. ALBIES: Yes, Your Honor.

6 MR. KARIA: Yes, Your Honor.

7 THE COURT: The United States brought this
8 lawsuit against the City of Portland under
9 42 United States Code § 14141. The United States and the
10 City of Portland have entered into a proposed settlement
11 agreement and have jointly moved the Court to accept the
12 settlement agreement as an order of the Court. Both the
13 United States and the City agree that entering into the
14 settlement agreement, rather than engaging in contested
15 litigation, is the best way to resolve the claims brought
16 by the United States in this matter, which concern
17 policing practices in the City of Portland.

18 Both the United States and the City further
19 agree that it will likely take several years, possibly as
20 many as five years, for the City substantially to comply
21 with all of the provisions of the settlement agreement.
22 In addition, both the United States and the City jointly
23 ask the Court to retain jurisdiction over this action for
24 all purposes until the City substantially has complied
25 with all of the provisions of the settlement agreement and

1 has maintained substantial compliance with all provisions
2 for one year.

3 The question now before the Court is whether the
4 settlement agreement, as a whole, is fair, adequate, and
5 reasonable as a means of revolving the claims raised in
6 the complaint. To assist the Court in answering that
7 question, the Court held a fairness hearing on
8 February 18th and 19th, 2014, and received both
9 pre-hearing and post-hearing written submissions and oral
10 testimony from the United States, the City of Portland,
11 Intervenor-Defendant Portland Police Association, Enhanced
12 Amicus Curiae Albina Ministerial Alliance Coalition for
13 Justice and Police Reform, which I refer collectively as
14 the four parties or the parties, and numerous members of
15 the public.

16 As the United States explained in its
17 post-hearing memorandum, this settlement agreement "will
18 fundamentally alter the way in which Portland Police
19 interact with the people who live and work in the City.
20 It creates a foundation to protect the civil rights of all
21 Portlanders, particularly those that live with mental
22 illness." The United States continues: "The goal of this
23 litigation -- to ensure that the Portland Police Bureau
24 has adequate policies, procedures, training, and
25 accountability in place so that encounters with people

1 with mental illness are constitutional -- will be achieved
2 through the implementation of the agreement. Approval of
3 this agreement will ensure that there is a roadmap for
4 sustainable reform. It will ensure DOJ monitoring of
5 remedies; public use-of-force audits; increased
6 community-based mental health options; workable solutions
7 to Citizen Review Committee deadlines and meaningful
8 Independent Police Review investigations; negotiating
9 changes to the 48-hour rule with the district attorney;
10 data gathering; and much more." That's from the
11 United States' post-hearing memorandum.

12 The City of Portland, in its post-hearing brief,
13 expressed very similar comments. According to the City of
14 Portland, the settlement agreement "represents an historic
15 opportunity for the City to engage in focused and
16 sustained efforts to improve outcomes in encounters and
17 persons in need of mental health crises services and local
18 law enforcement. The remedies in the agreement
19 specifically targeted to that issue are supported by
20 several mental health organizations." The City of
21 Portland in its post-hearing brief also notes that
22 "holding officers accountable for their conduct is an
23 integral part of building community trust, and the City
24 pursues that goal within and outside of the agreement."

25 The Defendant-Intervenor, Portland Police

1 Association, stated in its post-hearing memorandum that
2 the Portland Police Association supports the "entry of the
3 settlement agreement between Plaintiff United States and
4 Defendant City of Portland." The Portland Police
5 Association continued in their brief: "While the Portland
6 Police Association vigorously disagrees that the Portland
7 police officers have engaged in unconstitutional policing,
8 the settlement agreement -- in its current, unaltered
9 form -- is a fair, adequate, and reasonable resolution to
10 the allegations in the United States' complaint."

11 However, here, I must pause and offer the
12 Court's perspective on a comment made by the president of
13 the Portland Police Association a few days after the
14 public fairness hearing concluded. The president of the
15 Portland Police Association commented that "never have I
16 been exposed to such an array of complaints directed at
17 the men and women who risk their lives every day to
18 protect those who fall victim to crime, misfortune, or
19 crises." He then added that he "left the federal
20 courthouse wondering why we do the work we do. Why do we
21 put ourselves at risk on a daily basis? And why do we
22 expose ourselves to the scrutiny of those who have never
23 walked in our shoes?" The president of the Portland
24 Police Association concluded with his answer. He said,
25 "Because it is just what we do."

1 I would like to offer another answer to those
2 questions. In response to the question of why do the
3 sworn law enforcement officers put themselves at risk on a
4 daily basis, I believe that the answer is that they
5 believe, and they are committed, to the depths of their
6 souls, in the rule of law, and they heroically enforce the
7 rule of law in order to protect everyone in society from
8 lawless conduct.

9 But that answer to the first question, I
10 believe, also answers the second question posed by the
11 president of the Portland Police Association when he
12 asked, "Why do we expose ourselves to the scrutiny of
13 those who have never walked in our shoes?" The answer to
14 that question is the same as the answer to the first
15 question. It is because that is the very nature of a
16 constitutional democracy under the rule of law. The very
17 nature of the rule of law requires that the police subject
18 themselves to the scrutiny of and oversight by those who
19 have never walked in their shoes -- and that they receive
20 the praise and commendation when appropriate and that they
21 also receive constructive criticism and oversight when
22 appropriate.

23 The founders of this nation, when they devised
24 our Constitution, created a system of checks and balances
25 and separation of powers. Never before in the history of

1 the world had that been done. And that system has served
2 us very well, on a path of continuous improvement ever
3 since.

4 This great principle leads me to the concerns
5 that I currently have with the proposed settlement
6 agreement in the form that the parties are presenting me
7 with.

8 The proposed settlement agreement, in paragraph
9 178, provides that the United States and the City of
10 Portland will jointly move, or ask, the Court to
11 "conditionally dismiss the complaint in this action with
12 prejudice, while retaining jurisdiction to enforce the
13 agreement," if called upon to do so by the United States.
14 According to paragraph 178, if that motion were granted by
15 the Court, then if the United States does not call upon
16 the Court to take any action, the Court will have no
17 knowledge of what progress is or is not being made until
18 approximately October 12th, 2017, which is more than three
19 and one-half years from now.

20 Now, the United States, through the U.S.
21 Department of Justice and the U.S. Attorney's Office,
22 assures us that they will vigorously monitor the progress
23 that the City of Portland is making towards achieving
24 substantial compliance with all of the terms of the
25 settlement agreement. For those dedicated individuals who

1 are currently representing the United States in this case,
2 I have nothing but respect and praise. But prosecutorial
3 and enforcement priorities can change over time.

4 Part of the genius of our founders, when they
5 created a system of checks and balances and separation of
6 powers, is that they placed the judicial power of the
7 United States in the hands of judges who serve during good
8 behavior, which generally means life tenure.

9 If the parties were to agree that this Court
10 could periodically, and by that I mean approximately
11 annually, hear from all of the parties, and that includes
12 both Intervenor-Defendant Portland Police Association and
13 Enhanced Amicus Curiae Albina Ministerial Alliance
14 Coalition for Justice and Police Reform, if they wish to
15 be heard -- and also hear from the City-appointed
16 Compliance Officer/Community Liaison, the COCL, simply on
17 how compliance with the settlement agreement is
18 progressing and whether there are any obstacles or
19 impediments to achieving substantial compliance with all
20 of the provisions of the settlement agreement, and if the
21 parties were to agree that I could then hold the case in
22 abeyance; that is, to stay the litigation, rather than to
23 dismiss it with prejudice, even conditionally, then I
24 would be prepared to approve the settlement agreement
25 today.

1 It is not the intention of the Court to
2 micro-manage compliance activities or even to enter any
3 substantive orders, unless there is a specific motion to
4 do so brought by the United States that is well supported
5 on both substantive and procedural grounds. I understand
6 the mediation component of this, and that's what I mean by
7 "procedural grounds." I am satisfied with the parties'
8 responses to my several post-hearing questions regarding
9 the specific points in the settlement agreement. My
10 comments and my concerns relate to procedure and continued
11 understanding by the Court of how things are progressing.

12 So I am not satisfied with the prospect that
13 three and one-half years can go by with the Court hearing
14 absolutely nothing about how substantial compliance is
15 progressing. I have serious concerns that a requirement
16 of the Court must dismiss the case with prejudice, even
17 conditionally, upon approval of the settlement agreement
18 in the particular fashion that the parties are requiring
19 or insisting upon, as opposed to staying the case, will
20 render the settlement agreement in that fashion
21 inadequate.

22 I note here that the United States, in its
23 post-hearing submission, states that it has no objection
24 to the Court staying the litigation and holding annual, or
25 even semi-annual, conferences -- and, frankly, right now,

1 I am inclined to think that annual conferences are
2 sufficient -- to receive in open court reports from the
3 parties, the four parties, and the COCL and to answer the
4 Court's questions about how matters are progressing. Now,
5 if all parties were in accord, if all parties agree, that
6 would enable me to conclude today that the settlement
7 agreement is fair, adequate, and reasonable.

8 I note, however, that, at least as stated in
9 their post-hearing memoranda, both the City of Portland
10 and the Portland Police Association believe that the Court
11 holding periodic hearings, even on an annual basis and
12 just for the purposes of receiving information, would
13 violate the settlement agreement in their opinion and
14 doing so is opposed by both the City of Portland and
15 Portland Police Association, as stated at least in their
16 post-hearing memoranda.

17 I note that the enhanced curiae has no objection
18 to the Court serving in that capacity, and the amicus
19 curiae, in their post-hearing memoranda, even commented
20 that the Court can order that even over the objection of
21 the City or the Portland Police Association, because the
22 settlement agreement at paragraph 178 simply provides that
23 the parties will jointly ask the Court to dismiss the case
24 with prejudice, albeit conditionally, and that there is no
25 condition precedent or subsequent in the settlement

1 agreement that the Court actually have to grant that
2 motion. Perhaps we can discuss that a bit further.

3 I know that the United States argues that I can
4 simply approve the settlement agreement, stay the case,
5 and order periodic status conferences. Perhaps that's
6 their reasoning behind that. But because the City of
7 Portland and the Portland Police Association disagree, I
8 may need to hear a little bit more about that, unless we
9 can resolve it otherwise.

10 The foundation of any contract, and the
11 settlement at its core is just a contract, requires a
12 "meeting of the minds" among contracting parties. If the
13 United States and the City of Portland do not agree on
14 this point, then I would be concerned that there might not
15 be a "meeting of the minds," and if that's the case, there
16 might not be a settlement agreement, except, as I said, in
17 a form that I am not prepared to approve as fair,
18 adequate, and reasonable.

19 Those are my tentative thoughts. I have
20 prepared a draft order entering the settlement agreement
21 and staying litigation, consistent with what I have just
22 been describing.

23 Mary, will you pass these around to the counsel.

24 I do think it would be useful for counsel to
25 review the draft, consider my comments, and then share

1 with me any views that they may have. I would propose we
2 would take a ten-minute recess for that purpose.

3 Does ten minutes seem satisfactory?

4 MS. OSOINACH: Your Honor, I have a question. I
5 am unclear and would appreciate your guidance about what
6 you perceive to be the difference in terms of the Court's
7 authority between staying the case and dismissing it
8 conditionally and maintaining ancillary jurisdiction.

9 THE COURT: I am not aware of any precedent that
10 provides for the Court to have and to order periodic
11 progress reports when a case has been dismissed with
12 prejudice even conditionally, because the only condition
13 that I see in the agreement is that if the United States
14 moves for enforcement of the agreement, then I have
15 retained jurisdiction and can enforce it according to U.S.
16 Supreme Court precedent.

17 But in the absence of such a motion from the
18 United States, I question whether I even have the
19 authority to ask the parties -- and by "ask," that's sort
20 of polite for "ordering the parties" -- to come before me
21 on what I'm currently anticipating that is needed as an
22 annual basis, just to tell me how things are going, how
23 things are progressing, are there any problems or
24 obstacles?

25 I'm confident that no party here would be

1 intentionally rude or disrespectful to the Court, but if I
2 approve the settlement agreement, I think, as the City
3 currently argues it is to be understood, although there is
4 that interesting point that the amicus curiae and the
5 United States make about the reading of 178. But if I
6 interpret the agreement the way the City does, and I order
7 the parties to report to me on an annual basis how things
8 are proceeding, I think that a party could say, in
9 response, with all due respect to the Court and no
10 rudeness intended: No, thank you. This case has been
11 dismissed with prejudice, conditionally, and the only
12 condition that will get us back in front of the Court is a
13 motion by the United States. And if that hasn't occurred,
14 then there is no further jurisdiction or authority that
15 the Court has to compel the parties to appear.

16 That's a moderately long-winded answer to your
17 question, but that's my answer.

18 MS. OSOINACH: That's very helpful. Thank you.

19 MR. WOBORIL: Judge, the difficulty we faced in
20 responding to the Court's questions was what the
21 uncertainty of what a hearing would look like, how people
22 would behave in a hearing. I think the Court has given us
23 a little more information by describing this hearing as
24 one in which the Court would receive information.

25 We have designed a system in which the COCL

1 plays a significant role, a very important role, and
2 reporting to this Court would be a considerable expansion
3 of that role and also another audience to the COCL's
4 already broad range of audiences.

5 Would the Court expect at the hearing the Court
6 contemplates that there be cross-examination; that there
7 would be a testing of evidence at all? That's the
8 beginning of my questions, and we wonder what it would
9 look like, what responsibilities our COCL would have, how
10 that would change the dynamics of the system we have
11 created.

12 THE COURT: If you take a look at the proposed
13 order that I have distributed, particularly page 3, the
14 final order that I am proposing here is that the parties
15 and the COCL, and since I have no jurisdiction over the
16 COCL, but I have jurisdiction over the City, it would be
17 by ordering the City to so direct the COCL to appear
18 before the Court at periodic hearings, which are not
19 subject to the stay, to be held approximately annually,
20 unless otherwise ordered by the Court, to describe to the
21 Court the progress being made toward achieving substantial
22 compliance with all provisions of the settlement agreement
23 and any obstacles or impediments toward that end, or to
24 otherwise respond to the Court's questions on those
25 issues.

1 I am not envisioning, and I do not envision an
2 evidentiary hearing. I do not envision cross-examination.
3 However, if one of the parties were to say to the Court
4 that they would urge the Court to ask a follow-up
5 question, well, then in my discretion I may very well ask
6 a follow-up question. But I would not envision
7 cross-examination. I would not envision an evidentiary
8 hearing.

9 Although I understand that the settlement
10 agreement does create the role of the COCL, does
11 anticipate that the COCL will prepare quarterly reports,
12 even finalizing those quarterly reports after submitting
13 them in draft to affected or interested parties, including
14 a relevant board that's created. And even though
15 obviously the United States is prepared to be a monitor,
16 the concern that I have is that I may be hearing
17 absolutely nothing about how matters are progressing and
18 whether there are or are not obstacles or problems for
19 three and a half years.

20 In that respect, and, frankly, only in that
21 respect, I believe that the settlement agreement is not
22 adequate because I believe that does not afford enough
23 information flowing to the Court in a timely fashion.
24 Again, that's a long-winded answer to your question, but
25 that's my answer.

1 MR. WOBORIL: If I might observe, Judge, the
2 agreement anticipates that the COCL will be generating
3 reports continuously. Those will be available to the
4 Court as well. What I see the Court seeing as advantage
5 in the hearing, except the Court can ask questions, but
6 certainly we can create a mechanism, short of a hearing,
7 for the Court to address questions to the COCL.

8 Would that satisfy any of the Court's concerns?

9 THE COURT: I have not seen that proposed by
10 anyone. You understand my concerns. What I present to
11 you here would satisfy those concerns. Whether there are
12 other ways of satisfying those concerns, no one has
13 presented them.

14 MR. WOBORIL: Thank you.

15 MR. GEISSLER: Your Honor, may I ask the Court
16 for an electronic copy of the order so we can e-mail it
17 back to Washington, D.C.?

18 THE COURT: Yes. We will send it out to you
19 right now. Is Word format all right?

20 MR. GEISSLER: Yes, Your Honor.

21 MR. KARIA: Your Honor, a quick, clarifying
22 question, based on the Court's explanation of the model
23 that it foresees. I want to be clear. I think I
24 understand where the Court is going with this, but just to
25 be clear, would the Court, in terms of its enforcement

1 powers, envision itself having the ability to sua sponte
2 order the parties to administer, enforce, construct the
3 settlement agreement in any particular way based on the
4 hearings that the Court has proposed?

5 THE COURT: No. I do say that I think the Court
6 would have the authority to lift the stay. But then, just
7 with any lawsuit, it is up to the plaintiff to decide what
8 to do further and what to do next.

9 All right. We will be in recess for ten
10 minutes. I will e-mail that to you right now.

11 MR. GEISSLER: Thank you, Your Honor.

12 (Recess.)

13 (Open court; proceedings resumed:)

14 THE COURT: Good morning again. Who would like
15 to speak?

16 Mr. Geissler.

17 MR. GEISSLER: Thank you, Your Honor. If I may,
18 I would like to offer a summary of where I believe the
19 parties are and an invitation to the City and the AMA and
20 PPA to add further comment.

21 It is our understanding that the Court is
22 seeking a meeting of the minds whereby the Court would
23 have the ability to have annual status conferences for the
24 COCL and the parties to report on compliance and
25 identifying issues/obstacles to compliance.

1 It is also our understanding that if a stay were
2 entered with the option that the stay later be lifted,
3 from the plaintiff's point of view, it presents a certain
4 problem. If a stay is lifted, it would require the
5 plaintiff to reinvigorate the case and to prove its case
6 at that point in time. At a later point in time it
7 presents an unsure situation. The City may have complied
8 with some provisions, but not all, and the United States
9 may only want to seek compliance with the missing
10 provisions. Lifting the stay then would change
11 fundamentally the procedure from that of enforcement to
12 that of proceeding with its case-in-chief.

13 It is also the understanding, from the City's
14 point of view, a stay would fundamentally alter a deal.
15 As Your Honor has noted, the agreement is a matter of
16 contract. There is a certain balancing. On the one hand,
17 the parties could have agreed to a private agreement
18 without any "enforcement or oversight." On the other
19 hand, the United States could have proceeded with very
20 expensive and time-consuming litigation with a very unsure
21 end.

22 Rather than proceed on either of those lines,
23 the parties agreed to a Rule 41(a)(2), a conditional
24 dismissal, with the Court's conditional dismissal and the
25 final dismissal with prejudice, only after the condition

1 precedent, that is, the agreement, is fully complied with.

2 If a stay were put in place, it is our
3 understanding that the City Council would have to vote
4 again and that the entire agreement could unravel. There
5 is a different make-up of City Council and different
6 mayor. There are different concerns today than there were
7 a year ago.

8 The parties propose that they spend the next two
9 weeks -- this coming week is consumed with spring break
10 for many of the City Council members and others whose
11 families are traveling -- but that in that week we attempt
12 to fashion an appropriate order, agreed to by all four
13 parties, that would provide for a conditional dismissal
14 under Rule 41(a)(2) and that under that rule one of the
15 conditions be annual status conferences before the Court
16 at which the City may present the COCL and COCL reports,
17 and the Court may present questioning, but which would be
18 limited and would not be an evidentiary hearing, and that
19 there would not be general presentation of evidence by all
20 parties.

21 It is the understanding that if the parties
22 could agree to such a proposed order, that there would be
23 a meeting of the minds. There would be the ability to
24 enter the current settlement agreement, but that the order
25 would meet the Court's requirement of maintaining

1 continued Court oversight, and that by doing so, we would
2 have a different mechanism than the stay. We would have
3 the agreement that balanced between a private agreement
4 and litigation. We would keep the bargain. We would keep
5 the United States' ability to enforce that bargain through
6 the mediation process and the Court enforcement, and that
7 it would, by all means, give us the remedies that we want
8 while still maintaining Court oversight.

9 It is our understanding that the City may have
10 further questions on precisely how Your Honor would see
11 such a hearing take place so that we could attempt to
12 memorialize in the agreed order the parameters of such a
13 hearing.

14 THE COURT: I will hear from the City in a
15 moment, but let me ask you, Mr. Geissler, and I have
16 looked into that as well. I am unaware of any case law
17 authority that would give jurisdiction to the Court under
18 a 41(a)(2) dismissal to do anything other than to enforce
19 the settlement agreement.

20 Are you aware of any case law precedent that
21 would allow the Court to have jurisdiction under the
22 circumstances that you have just described?

23 MR. GEISSLER: Your Honor, I have been informed
24 by our friends at AMA that they have in fact done that
25 specific research only recently and are prepared to

1 present that case law. We would commend Your Honor's
2 attention also to the text itself of Rule 41(a)(2) in
3 which the conditions can be set.

4 THE COURT: I'm quite confident that conditions
5 can be set, but Federal Rules of Civil Procedure do not
6 confer subject matter jurisdiction. We know from case
7 law, both from the United States Supreme Court and the
8 Ninth Circuit, that when a case is dismissed with
9 prejudice, even with conditions, the Court loses subject
10 matter jurisdiction except to enforce the settlement
11 agreement, and that's my concern.

12 MR. GEISSLER: We understand that, Your Honor.
13 I believe that the problem may lie in our own drafting.
14 In the settlement agreement itself, we use the term
15 "dismissal with prejudice." In the motion to approve the
16 settlement agreement, which is a joint motion between the
17 City and the United States, we state out more carefully
18 that procedure, and the procedure being conditional
19 dismissal and only upon the conditions having been met,
20 then a dismissal with prejudice. The prejudice would not
21 be entered on the record and would not take any effect
22 until after the condition is met.

23 THE COURT: So if that is something that you
24 plan on either briefing or addressing or having someone
25 brief further, that would be fine with me. But that is my

1 concern with just relying on a rule of civil procedure,
2 because a rule by itself does not confer subject matter
3 jurisdiction once lost.

4 MR. GEISSLER: Understood, Your Honor. Thank
5 you.

6 THE COURT: Thank you.

7 Does the City wish to be heard?

8 MR. WOBORIL: Mr. Geissler has accurately and
9 comprehensively summarized the ideas that were discussed
10 by the parties. We are unable to announce some of the
11 conclusions, as he notes, as to the value of various
12 pieces of this proposed agreement, but we will take the
13 proposed agreement to our client. It may help us in
14 discussing the matter with our client to understand what
15 exactly the Court wants to retain as an ability to affect
16 the course of compliance with the agreement.

17 THE COURT: Sure. I found the fairness hearing
18 input from all four parties, both in writing and orally,
19 and also from the public very valuable. As you can tell
20 from my tentative ruling, I am prepared to approve the
21 agreement as fair, reasonable, and adequate, subject to
22 the ability of the Court to just keep an understanding of
23 how progress is being made.

24 There are a number of other issues that I raised
25 in my questions. To paraphrase, I think, what the

1 parties' essential answers are, those points have some
2 merits to them, and we will continue to discuss them, but
3 we're not prepared at this time to put those specific
4 substantive points in the settlement agreement. I accept
5 that.

6 I do think that there is value to the Court
7 hearing in a public hearing how things are progressing. I
8 would envision that I would allow any of the four parties,
9 the United States, the City, the Defendant-Intervenor
10 Police Association, and the enhanced amicus to present to
11 the Court, in whatever form it wishes, not including
12 cross-examination, but whatever affirmative form it
13 wishes, information to the Court in a public hearing --
14 and the COCL -- about how the agreement is progressing and
15 where there are any obstacles, if there are any obstacles.
16 I may have follow-up questions, just simply more
17 information and to understand what's going on.

18 If I were to hear that the progress is quite
19 insufficient and inadequate, I would ask the United States
20 where do things stand in terms of the United States'
21 consideration of bringing a motion before the Court. I
22 won't speculate on what those circumstances might be or
23 what the answers might be, but what I want to prevent is a
24 situation arising in several years from now, after an
25 agreement is made and approved, in which the United States

1 says that there isn't substantial compliance, or maybe one
2 of the parties, the enhanced amicus, says that there is
3 not substantial compliance. And we have heard nothing,
4 and I can hear nothing from the United States, because the
5 United States has chosen not to bring a motion.

6 I just want to make sure that if any settlement
7 agreement is going to have the imprimatur of the Court,
8 and I think as Mr. Geissler said, they didn't have to come
9 to court. The parties could have worked out a private
10 agreement if they wanted to. But if the parties are
11 asking for the imprimatur of the United States District
12 Court, I want to make sure that at least I am kept timely
13 informed and in a public fashion about how things are
14 progressing towards implementation with an eye towards
15 eventually full dismissal unconditionally with prejudice.

16 MR. WOBORIL: Would the Court see a role in
17 guiding performance under the contract based on
18 information it receives at such a hearing?

19 THE COURT: The answer is no. I mean, that's
20 not the Court's ruling. As I said, I'm not planning on
21 micro-managing. Now, to be fair, some people may say,
22 well, when somebody asks questions, is that guidance?
23 Reasonable minds can disagree. Some may say yes; some may
24 say no. But I am not planning, and I don't even think I
25 will have the authority to enter any substantive orders at

1 all other than asking people to appear and answer
2 questions.

3 Absent a motion by the Government to enforce, I
4 do not believe, and I am prepared to accept that I will
5 have no authority to order any specific course of action
6 be taken other than periodic progress reports in answering
7 informational questions that come from the Court.

8 MR. WOBORIL: Thank you, Judge. That's helpful.
9 This is a complicated matter. We are going to have a very
10 complicated briefing for our briefings. Ms. Osoinach may
11 have follow-up questions that I haven't thought about.

12 MS. OSOINACH: I do have two questions. First,
13 you said that the fairness hearing and the manner in which
14 you received information was quite helpful to you, and
15 then you also said at the annual hearings that you are
16 contemplating that the purpose of the hearing is to
17 receive information. So would you envision that, for
18 instance, if the Albina Ministerial Alliance Coalition, if
19 they wished to call members of the public to present
20 information, would that be something that you would
21 envision?

22 THE COURT: Yes. What I would not envision is
23 the Court having its own public comment period. That's
24 not what this is about. But I would invite information
25 from any of the parties in whatever fashion the parties

1 wish to present. If the United States wanted to call
2 Captain Gruber back or anyone else they wanted to call to
3 present information, I would be glad to hear from them.
4 If the City wanted to call anyone, whether it be council
5 or anyone other than council, however the City wishes to
6 present it, that would be fine with me. The same with the
7 Portland Police Association and the same with the enhanced
8 amicus. So if the enhanced amicus wanted to make argument
9 to the Court, I would receive it. If the enhanced amicus
10 wanted to present a witness on their behalf to provide
11 information to the Court, I would receive it. I would not
12 open it up, however, for general comment by the public.

13 MS. OSOINACH: Thank you. The second question,
14 you said that your concern is you want to prevent a
15 situation arising several years from now in which the
16 United States says that there is no substantial
17 compliance, and then you said "or maybe enhanced amicus."

18 Are you also envisioning a situation where the
19 United States, the City -- we could be in agreement -- our
20 COCL could have been in agreement, the community board
21 could be in agreement that the City is in substantial
22 compliance, and yet you would receive information from the
23 enhanced amicus indicating that they believe that perhaps
24 everyone was flawed.

25 What do you envision doing with that

1 information?

2 THE COURT: Well, the answer to your first
3 question is, yes, I do envision that that would be an
4 opportunity. What do I envision doing with it? Asking a
5 question to the United States. If the United States and
6 the City and the Portland Police Association believe that
7 there has been substantial compliance and that no further
8 activity is necessary, and they are prepared to dismiss
9 the case, and if I dare say there is no motion necessary
10 at all to enforce compliance, if the enhanced amicus, one
11 of the four parties here, wants to make an argument to the
12 contrary, since I'm not retaining any power to order any
13 activity, but only to obtain information, I would receive
14 that information from the enhanced amicus. And then I
15 would probably turn to the parties, probably first to the
16 United States and then to the City, and say: What's your
17 response? I would say: The enhanced amicus says that in
18 these particulars, there is not substantial compliance.
19 What is your response? But I think that would be the end
20 of my legal authority.

21 MS. OSOINACH: Thank you.

22 THE COURT: Does the Portland Police Association
23 wish to be heard on any of these issues?

24 MR. KARIA: Nothing of substance right now,
25 Your Honor. I think Mr. Geissler has adequately outlined

1 the issue that I think we need the two weeks to thoroughly
2 vet and think about.

3 THE COURT: Does enhanced amicus wish to be
4 heard on any of these issues?

5 MS. CURPHEY: Yes, Your Honor. We wish to be
6 heard on our argument under 41(a)(2). I understand the
7 Court's concern about jurisdiction. We put this in our
8 brief. There is ancillary jurisdiction, and the Court's
9 inherent power to vindicate its own authority. So I will
10 walk with you through that. 41(a)(2), as you know,
11 requires judicial authority to settle.

12 I recently found a case, which is not cited in
13 my brief, which is Lau. It is at 792 F.2d 929. It is a
14 Ninth Circuit case from 1986. It states, "A voluntary
15 dismissal [under 41(a)(2)] cannot take effect until a
16 court order has been entered and the terms and conditions
17 imposed by the court are complied with."

18 I also want to note that in Kokkonen, which
19 addresses this issue of ancillary jurisdiction under
20 41(a)(2), it makes a distinction between 41(a)(2) and
21 41(a)(1). Under 41(a)(2), which is what we're talking
22 about here, it says the Court, in its discretion, may make
23 compliance with the terms of the settlement agreement, one
24 of the terms set forth in its order, whereas under
25 41(a)(1), "The Court may do so only if the parties agree."

1 I think you don't need all of our agreement to
2 impose conditions in your acceptance of the settlement
3 agreement and your entry of an order.

4 Additionally, Kokkonen, O'Connor, and Alvarado,
5 are the Ninth Circuit cases cited, I think, in everyone's
6 briefs about how the Ninth Circuit has dealt with
7 Kokkonen. In all of those cases, they involved a
8 situation in which the Court did not retain jurisdiction
9 to enforce the terms of the settlement agreement. So they
10 don't talk about what the Court can do under 41(a)(2).
11 They don't reach that, because the Court never retained
12 jurisdiction in the first place. In Alvarado, the
13 jurisdiction had expired when the party brought its
14 motion.

15 Those cases also don't describe the outer limits
16 of the Court's inherent authority to enforce its own
17 orders. I cite some cases in my brief that discuss that
18 authority. Again, I don't think this requires an
19 amendment to the agreement, because the parties could have
20 agreed to dismiss under 41(a)(1). They didn't need your
21 permission to do that. But they have agreed to ask you,
22 under 41(a)(2). As you noted, the agreement says in
23 paragraph 175(b), "The Court shall retain jurisdiction in
24 this action for all purposes until the City has
25 substantially complied with all provisions."

1 Moreover, the agreement, in that same paragraph,
2 states that it is void if the Court does not retain
3 jurisdiction. It doesn't say anything about it being void
4 if the Court does retain jurisdiction. In fact, it
5 anticipates that. So we don't think that you need all the
6 parties to agree. We think you have the authority to
7 require the status hearings, and I don't think it would
8 require us to make any substantial changes to the
9 agreement.

10 THE COURT: Since I don't need to rule on that
11 question now, I am not going to, but I will share with you
12 what my concerns are. First of all, under paragraph 178,
13 I understand your argument, and you may very well be
14 right, but it may also be an ambiguity in the agreement,
15 and an ambiguity in the agreement might result in an
16 unenforceable contract. It is unclear.

17 Now, with respect to your comments under
18 41(a)(2), here is my concern: If I were to impose
19 conditions that were not agreed to, I need to be concerned
20 about the Portland Police Association's collective
21 bargaining rights.

22 Now, I've looked at the collective bargaining
23 agreement. There is nothing implicated in the collective
24 bargaining agreement that would be implicated if I were to
25 require periodic reports of the sort that I have been

1 describing. However, the original underlying settlement
2 agreement, at least so argues the Portland Police
3 Association, does contain some provisions that at least
4 they argue violate their collective bargaining rights. I
5 have not made a ruling on that. But I do believe that if
6 a settlement agreement were to violate the collective
7 bargaining rights of a third party, like the Portland
8 Police Association, it could not be entered purely by
9 settlement agreement and by court order under any aspect
10 of Rule 41. It could be ordered by the Court as part of
11 equitable relief after a trial on the merits; then I'm not
12 bound by the collective bargaining agreement.

13 As I read the Memorandum of Understanding and
14 the documents filed by the Portland Police Association,
15 they are agreeing to waive whatever arguments they may
16 have that the settlement agreement contains provisions
17 that violate their collective bargaining agreement,
18 provided that the Court enter the relief that the parties
19 request and no more. Therefore, at least arguably, and
20 I'm not making a decision, but I'm sharing my thinking
21 with you, at least arguably that waiver does not exist if
22 I were to add additional conditions, which although
23 Rule 41 might allow me to add, I might not be able to add
24 if the legal effect were that the
25 Portland Police Association withdraws its waivers of

1 objections to any other provisions in the settlement
2 agreement that may or may not be in conflict with the
3 collective bargaining agreement. That's why I will, at
4 least, take this one step at a time.

5 MS. CURPHEY: I had this conversation with the
6 attorney for the PPA. I obviously don't see how us
7 speaking to you materially changes their MOU.

8 THE COURT: I would be fine if the Portland
9 Police Association counsel want to say they have no
10 objection to that and do not believe that these procedures
11 that I have outlined and I have described tentatively, if
12 he says those are acceptable to the Portland Police
13 Association, then I have no problem with that. If he
14 says, as he did in his post-hearing memo, that they do
15 present a problem and that the entire waiver of any
16 objections under the collective bargaining agreement are
17 contingent on me not ordering those additional conditions,
18 then I have some tough decisions to make.

19 MS. CURPHEY: Thank you.

20 THE COURT: Do you have an idea when you would
21 like to report back? Do you want to report back to the
22 Court in a hearing or just by paper?

23 MR. GEISSLER: Your Honor, if we may, could we
24 have a two-week guidance and then submit something in
25 writing, perhaps an agreed order? If the parties find it

1 necessary, if the Court would permit us to provide
2 briefing -- not that it would be required -- but
3 Your Honor has asked for legal authority under Rule 41, we
4 may take advantage of that, Your Honor.

5 THE COURT: That makes sense. Unless anyone has
6 any other approaches, I will order that two weeks from
7 today the parties will submit any -- will that work? Two
8 weeks from today? If you said you have to get back to a
9 City Council meeting, when is your next City Council
10 meeting?

11 MR. WOBORIL: It will happen next week. We
12 would have a difficult time getting an ordinance on yet
13 this week. We would have to do a lot of decision-making
14 before Thursday. That's unlikely.

15 THE COURT: What time frame would the City like?

16 MR. WOBORIL: If it requires Council action,
17 three weeks, Judge, I am afraid is necessary.

18 THE COURT: I have no problem with that.

19 MR. GEISSLER: Your Honor, we are not sure that
20 it would actually require City Council vote if it is
21 merely an agreed order of motion and not an amendment to
22 the settlement agreement, but I believe that issue is
23 still unresolved.

24 MR. WOBORIL: Perhaps we should try to move as
25 quickly as possible or take the opportunity to move as

1 quickly as possible with a two-week setting. If we are
2 not going to be able to do that, we will inform the
3 parties and the Court and then adjust.

4 THE COURT: We will set it for two weeks. If
5 anyone moves for an extension of one week or so beyond
6 that, I anticipate granting that motion for extension of
7 time.

8 MR. WOBORIL: Very good.

9 THE COURT: All right. So we will schedule
10 right now that by the close of business on Monday,
11 April 14th, the parties will submit to the Court in
12 writing their positions in response to the tentative
13 comments shared by the Court at this hearing. Let me know
14 in your position whether there is agreement or not
15 agreement among the four parties, and if there is not
16 agreement, whether people believe that a further in-court
17 hearing would be helpful to resolve these issues.

18 Anything further that we should address at this
19 time in this hearing? First, the United States.

20 MR. GEISSLER: Nothing, Your Honor. Thank you
21 very much for hearing from us today.

22 THE COURT: From the City?

23 MR. WOBORIL: Nothing more, Judge. Thank you.

24 THE COURT: From the Portland Police
25 Association?

1 MR. KARIA: Nothing, Judge. Thank you.

2 THE COURT: And from enhanced amicus?

3 MS. ALBIES: Nothing further, Your Honor.

4 Thank you.

5 THE COURT: Thank you. I look forward to
6 reading what you submit by April 14th. We will be in
7 recess. Thank you.

8 (Court adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

March 25, 2014
DATE